

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

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IN THE MATTER OF: _____ :

CONSENT MARKETS, TARIFFS AND :

RATES - ELECTRIC :

CONSENT MARKETS, TARIFFS AND RATES - GAS :

CONSENT ENERGY PROJECTS - HYDRO :

CONSENT ENERGY PROJECTS - CERTIFICATES :

MARKETS, TARIFFS AND RATES - ELECTRIC :

MARKETS, TARIFFS AND RATES - GAS :

ENERGY PROJECTS - CERTIFICATES :

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COMMISSION MEETING - 779TH REGULAR MEETING

Hearing Room 2 C

Federal Energy Regulatory

Commission

888 First Street, N.E.

Washington, D.C.

Tuesday, November 20, 2001

10:10 a.m.

1 APPEARANCES:

2 COMMISSIONERS PRESENT:

3 CHAIRMAN PAT WOOD, III, Presiding

4 COMMISSIONER LINDA KEY BREATHITT

5 COMMISSIONER NORA MEAD BROWNELL

6 COMMISSIONER WILLIAM L. MASSEY

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8 SECRETARY DAVID P. BOERGERS

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12 ALSO PRESENT:

13 DAVID HOFFMAN, Court Reporter

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHAIRMAN WOOD: Good morning.

4 This open meeting of the Federal Energy
5 Regulatory Commission will come to order to consider matters
6 which have been duly posted in accordance with the
7 Government in the Sunshine Act for this time and place.

8 Please join me in the pledge to the flag.

9 (Pledge of Allegiance recited.)

10 CHAIRMAN WOOD: I have the proud but sad pleasure
11 to announce that this is Mr. Boergers's, our loyal and
12 faithful and true Commission Secretary, last meeting in this
13 position, although I hope he will come back to brighten this
14 place with your countenance in the future. But I would like
15 to, on behalf of the staff and Commissioners of the FERC,
16 present you with this lovely plaque: presented to David P.
17 Boergers, who is hereby deemed an exemplar of public
18 service, for a distinguished career in pursuit of the
19 values, mission and vision of the Federal Energy Regulatory
20 Commission.

21 Congratulations, David.

22 (Applause.)

23 COMMISSIONER BREATHITT: Dave's going to
24 California, as many of you may know, and I'm not going to
25 pull an Ed Markey and sing a version of "California

1 Dreaming" like we got at a not-too-distant hearing. But I
2 wish you well, Dave. It's been wonderful to work with you
3 and have you pop in our offices at 5:30 or 6:00 and say,
4 have you not signed that order out yet.

5 SECRETARY BOERGERS: Thank you.

6 CHAIRMAN WOOD: We'll put you to work one last
7 time. Consent agenda.

8 SECRETARY BOERGERS: Thank you, and I appreciate
9 the remarks.

10 On the consent agenda this morning are E-4, E-6
11 through -11, E-14, E-17, -20, -23, -27 through -29, -32,
12 -33, -36, -38 and -44; G-3, -5, -7, and -13 through -16; H-1
13 through -3, C-1 through -3, and C-7 through -9.
14 Commissioner Breathitt votes first.

15 COMMISSIONER BREATHITT: Aye.

16 COMMISSIONER BROWNELL: Aye.

17 COMMISSIONER MASSEY: Aye.

18 CHAIRMAN WOOD: Aye.

19 SECRETARY BOERGERS: The first item for
20 discussion is E-3.

21 CHAIRMAN WOOD: I have no further questions.
22 They were resolved. I'm fine with the order as proposed.

23 SECRETARY BOERGERS: Shall we take a vote?
24 Commissioner Breathitt?

25 COMMISSIONER BREATHITT: Yes.

1 COMMISSIONER BROWNELL: Yes.

2 COMMISSIONER MASSEY: Aye.

3 CHAIRMAN WOOD: Aye.

4 SECRETARY BOERGERS: The next items are E-5, E-26
5 and E-47. Jerry Pederson has a presentation for the staff.

6 MR. PEDERSON: Good morning, Mr. Chairman,
7 Commissioners.

8 Before you are three related orders. The first
9 order, E-26, we act on the triennial market update submitted
10 by AEP, Entergy and Southern Companies. The draft order
11 announces a new generation market power screen for the
12 supply margin assessment, or SMA, that we will apply to
13 market-based rate applications on an interim basis pending a
14 generic review of new analytical methods for analyzing
15 market power.

16 As a method for assessing whether an applicant
17 has generation market power, the SMA builds on and approves
18 the existing hub and spoke analysis in two ways. First, in
19 determining supply in the market, the SMA considers
20 transmission constraints by limiting competing supplies by
21 the total transmission capacity. Second, in determining the
22 size that triggers generation market power concerns, the SMA
23 establishes a threshold based on whether an applicant is
24 pivotal in its control area market. An applicant is a
25 pivotal supplier if its generation must run to meet control

1 area market peak demand.

2 We have applied the SMA screen to triennial
3 market updates submitted by AEP, Entergy and Southern
4 Company. The draft order finds these applicants are all
5 pivotal suppliers in their control area markets, and
6 accordingly institutes the mitigation.

7 The mitigation proposed by the draft order is,
8 first, each applicant must offer uncommitted capacity for
9 spot market sales in its control area market. Uncommitted
10 capacity is defined as capacity available after serving load
11 and minimum operating reserves, and will be priced under a
12 traditional cost-based, split-the-savings formula.

13 Each applicant must post on its company web site
14 projected 24-hourly incremental costs for energy offered
15 from uncommitted capacity for spot market sales in its
16 control area market, or in control areas surrounded by the
17 applicant's control area, for the following trading day. In
18 order to insure that the sales offered are accurately
19 posted, each applicant is also required to simultaneously
20 post hourly decremental cost data for potential purchasers.
21 Applicants are required to purchase spot energy offered at
22 the delivered price below the applicant's posted decremental
23 price.

24 Second, in order to increase supply and reduce
25 the applicant's relative size, the draft order requires that

1 the transmission provider treat a merchant generation plant
2 for interconnection purposes as a competing network resource
3 for meeting load and load growth. Lastly, applicants are
4 required to employ an independent third party to operate and
5 administer their OASIS sites.

6 The second order, E-5, the Commission notes that
7 Huntington Beach Development is exempt from the SMA screen
8 because it will sell into a market with Commission-approved
9 monitoring and mitigation. As a result, this order denies
10 rehearing of the Commission's order issued on August 17,
11 2001, in which the Commission conditionally accepted the
12 proposed market-based power sales tariff filed by
13 Huntington Beach.

14 In the third order, E-47, the Commission
15 institutes a proceeding pursuant to Section 206 of the
16 Federal Power Act to investigate the justness and
17 reasonableness of the terms and conditions of market-based
18 rates, tariffs and authorizations of public utilities that
19 sell electric energy and ancillary services at wholesale and
20 interstate commerce. The draft order proposes to revise all
21 existing market-based rate tariffs and authorizations to
22 prohibit sellers from engaging in anti-competitive behavior
23 or abuse of market power, such as physical or economic
24 withholding. Violation of the proposed provision would
25 constitute a violation of a tariff rate schedule on file

1 under the Federal Power Act, and the Commission would have
2 the authority to address the instances of anti-competitive
3 behavior or exercise of market power through the imposition
4 of refunds or other remedies as may be appropriate.

5 The draft order establishes a refund effective
6 date 60 days from the date in which notice of initiation of
7 this investigation is published in the Federal Register, and
8 seeks comment on our proposal to revise all market-based
9 rates, tariffs and authorizations in effect.

10 This concludes my presentation, and we're
11 available for any questions you might have.

12 COMMISSIONER MASSEY: Are we going to discuss
13 this? Okay.

14 I have a concern. Generally speaking, I think
15 this moves in the right direction, and I support it, and I
16 appreciate all the hard staff work.

17 I have been talking about the antiquated hub and
18 spoke method for quite awhile now, and I'm pleased that
19 we're moving forward. And generally, I think the SMA screen
20 is an improvement, and I support it. It may not have been
21 the precise approach I would have chosen, but I think it is
22 a solid approach and will give us a much more accurate
23 snapshot of the market.

24 I like the pivotal supplier concept. As I
25 understand it, it means that if a supplier's capacity is

1 necessary to meet peak demand, if my percentage of the
2 marketplace is 20 percent, and the reserve margin at peak is
3 15 percent, then my supply is necessary to meet that peak
4 demand.

5 Is that correct? That's the way it works? So I
6 think the concept is a good one, and I support it.

7 On the tariff condition, one of the motivating
8 factors for me in advocating that we pursue a tariff
9 condition that applies to all sellers in market-based
10 pricing is the situation that we found ourselves in in
11 California, in which prices began to soar in June of 2000.
12 And prices were extraordinarily high in June, July, August
13 and September of 2000.

14 Yet we have no way, because there was no tariff
15 condition in place at the time, that provided for refund
16 protection if prices were unjust and unreasonable. Since
17 there was no tariff condition in effect at that time, we
18 have no way to go back to June, July, August and September
19 of 2000 with refunds. And that's perhaps several billion
20 dollars. I don't know how much it is.

21 But I'm concerned about that. And I don't think
22 the customers ought to bear that burden solely for an out-
23 of-control market.

24 Now, as I understand this new tariff condition,
25 it basically says: if we catch you engaging in bad behavior,

1 you may have refund liability. So it's triggered by bad
2 behavior, like withholding of generation -- either economic
3 or physical withholding -- or some sort of strategic bidding
4 that I suppose would be called withholding in the
5 methodology of bidding.

6 Am I correct about the way this new tariff
7 condition would apply? Anyone?

8 MS. LEAHEY: Yes, you're correct.

9 COMMISSIONER MASSEY: So we've got to find bad
10 behavior.

11 Well, this is an improvement over nothing. But
12 my concern is, we have yet to find bad behavior in the
13 California market. Our December 15 and later orders are
14 based solely on the theory that this was an out-of-control
15 market that justifies refunds, and the refunds begin October
16 2 of last year.

17 My concern is, even with this improvement -- and
18 I'm not talking just about California, but anywhere -- if
19 the market is out of control, if there's simply a
20 dysfunctional market and we find no bad behavior, there is
21 still no refund protection under this new tariff condition.

22 Am I correct?

23 MR. PEDERSON: Yes, that's correct.

24 COMMISSIONER MASSEY: So even under this new
25 tariff condition, it seems to me that the customer bears the

1 burden, bears the risk of an out-of-control market where we
2 find no bad behavior. That remains a concern of mine.

3 So if any of my colleagues or any staff would
4 like to comment on that?

5 CHAIRMAN WOOD: I'll take a stab.

6 I want us to look at these three orders together
7 to try to get some ability to look at this stuff as a
8 continuum of addressing what I think we learned so painfully
9 in California about markets that aren't supervised as they
10 transition from the old world to the new. I think actually
11 we'll talk in a moment about some items in the New York
12 market where we're talking about market mitigation tools
13 that the ISO in that market has to use.

14 The application of the SMA test to me is the
15 heart of the new way of moving forward. And it basically
16 says, if you're big enough to control the market, whether
17 that market is very overbuilt, just right or tight at the
18 time that we look at it, if you have the ability to control
19 that market because you're at or greater than that supply
20 margin, then you will have in effect mitigation put on you
21 with the INC/DEC bid that Jerry just laid out.

22 That focuses, I think, more surgically than the
23 west-wide mitigation order that we are living under now in
24 the west. It focuses more surgically on the parties who
25 have the ability to exert market power in a competitive or

1 reasonably competitive market. So for that reason, I think
2 the SMA test is a much more surgical and better approach
3 than what we have in California.

4 Yes, it catches more than the hub and spoke did.
5 But I think anything could catch more than the hub and spoke
6 did, so I don't know that that's saying a lot. But in my
7 mind, it's comparing the market that we have had at this
8 Commission that is out of control, which is the west market,
9 to the way to catch, so that's good.

10 Huntington Beach stands for the proposition that
11 if you're in a regional, in an ISO area where you have a
12 mitigation plan working, that the SMA test doesn't really
13 kick in. So in other words, the predicate for Huntington
14 Beach is that you've got mitigation going on overseen, in
15 this case, directly by the Commission.

16 The concern I have about Huntington Beach that I
17 would like to talk about with you all in a moment is, once
18 the mitigation permissions expire on 9/30/02, if the Cal ISO
19 doesn't have an independent market monitoring effort along
20 the lines of what we see in the northeast working, I think
21 in my mind we would at that point have to go back and do the
22 supply margin assessment for that whole market. And I would
23 much rather deal with it by getting those folks in an ISO or
24 RTO that has market mitigation tools like we see being used
25 in New York, New England or PJM than having to go through

1 this successively.

2 Where that gets us on the item you raised, Bill,
3 is I think we all agree we want to put the hook in those
4 certificates on anti-competitive behavior. The next
5 question is, as we talked about it at my first meeting as
6 Chairman when you brought it up, was the market dysfunction.
7 You don't find a single bad player, either because there
8 isn't one or because we aren't adept enough at finding it,
9 which is hard to do. But because it's not working well,
10 there is a gap.

11 I think if we did the SMA test on everybody
12 today, there would not be a need for such a provision,
13 because you would in fact catch the person who has the
14 ability to control that market. It focuses on people who
15 are not in markets that have proper oversight under the
16 guise of an ISO or RTO. But there is a gap there, and I'm
17 concerned, and I share your concerns. You and I talked
18 about it last night.

19 We all haven't had the chance to sit down and
20 think through. I would be open to -- I would like to get
21 the anti-competitive provisions out in the order today,
22 because one, I think we're all more comfortable with that.
23 But two, we need to get the 60-day clock running on that,
24 and I would commit, in the period between now and the next
25 meeting, to put up a notational order that would follow on

1 to this one; some limited form of plugging the gap between
2 now and the time that an applicant undergoes either its
3 triennial review -- or we could expedite that, certainly, if
4 we need to, particularly in the western market, as that
5 mitigation plan runs out -- some sort of provision to plug
6 the gap between now and the time somebody undergoes the
7 application of the new market-based rate test.

8 That's not in this order. I tried to scratch
9 something together last night. I think properly it needs to
10 have the back and forth that we benefit from on our brain
11 trust across the table here. I would commit to putting that
12 out, but I do share your concern that there is a little
13 light coming through the wall here that we haven't properly
14 plugged, and I think we should do that.

15 But I do view that the SMA test realized both
16 within an ISO -- which is the Huntington Beach order -- and
17 not in an ISO or RTO, which is the E-26 order, that that in
18 my mind at least fills the gap. So that's the end point we
19 want to get to.

20 We've got a period of time between today and the
21 full application of the SMA test to all market-based rate
22 certificate holders that we do need to plug. And I do think
23 that that is a gap here that we need to do something about.

24 COMMISSIONER BROWNELL: I'd be willing to look at
25 something. But I would caution all of us to resist the urge

1 to micromanage or fix things that are in the process of
2 fixing themselves.

3 I think California was a horrendous experience,
4 and we learned a lot. I think clearly there would have been
5 market conditions like these and tests like these applied,
6 and we might have avoided it. But if public policy in a
7 certain area interferes with the appropriate development of
8 capacity and distorts market functions, I'm not sure that
9 market participants ought to be penalized because of the
10 inadequate future planning.

11 I don't want to go down a road where we are so
12 controlling markets -- and it's a little bit like trying to
13 protect an adolescent from themselves -- but we need to be
14 sure whatever we do to fill this gap does not have the long-
15 term effect of slowing down a market, slowing down
16 investment, sending the message that we're going to be there
17 managing through every problem. The reality is that we need
18 to get the supply-demand imbalance in California and the
19 west sufficiently developed so that we're not dealing with
20 incredible market distortions such as occurred. I certainly
21 want to look at it.

22 I also think we ought to kind of look at how this
23 is working, and make sure we understand the impact. It may
24 have a greater effect than we know. I just don't want to be
25 rushing out making all kinds of rules that are responding to

1 something that happened a year ago.

2 We just need to be cautious here. We need to
3 begin to develop these markets and hope that, with our
4 infrastructure hearings and other kinds of economic signals,
5 these markets are developing on their own.

6 COMMISSIONER BREATHITT: I agree with a lot of
7 what Commissioner Brownell has said. I can support the
8 order as it is currently written. E-47, the investigation
9 of terms and conditions of public utility market-based rate
10 authorizations -- that does require a tariff change, and the
11 order defines anti-competitive behavior as physical and
12 economic withholding.

13 And while the concepts of market-based rates and
14 refund conditions are not in my mind entirely consistent
15 with each other, I think we can all agree that anti-
16 competitive behavior should not be sanctioned by the
17 Commission. So I could not have supported an order imposing
18 refunds for market dysfunction, because I think that that is
19 so much harder to define, does create uncertainty, and
20 that's something that we had discussed at a prior meeting.

21 So the order is not written that broadly, and I
22 can support it. But I think it does improve what we do have
23 now, and I think it is quite frankly a compromise from what
24 we had before, and what we talked about possibly doing at
25 the meeting about a month ago. So I like this order, and

1 will be able to vote on that.

2 In terms of the E-26 order on the three companies
3 that were cited by staff and described, I will not be
4 supporting that order. I'd like to explain to my colleagues
5 why.

6 We are taking a very important action in this
7 order. I do not wish my dissent to signal a difference of
8 opinion with respect to the fundamental policy objectives
9 that the order attempts to foster. Instead, my discomfort
10 is with the way that the order has chosen to pursue those
11 objectives.

12 As I view the order, its basic underlying
13 objectives are twofold. First, the order seeks to find a
14 substitute for the hub and spoke market power analysis that
15 we traditionally used to evaluate our market-based rate
16 applications. As I have publicly stated on several
17 occasions, I share my colleagues' concern that the hub and
18 spoke method may not adequately protect against the exercise
19 of market power, and I believe the Commission must take
20 action to undertake an inquiry into improving our analysis.

21 However, I do not support the approach of
22 applying the Commission's newly-designed supply margin
23 assessment screen and requiring the mitigations set forth in
24 this order as an interim measure until the Commission is
25 able to complete a broader generic inquiry. My primary

1 concern with the interim measure is that the SMA and the
2 mitigation measures required of those utilities that failed
3 the screen have been cobbled together very quickly without
4 the benefit of comment, and I cannot say with confidence
5 that the screen presents the best method of assessing market
6 power, nor that we can predict what effect the various
7 mitigation measures will have on wholesale competition and
8 the development of energy markets.

9 I believe one effect might be to cause utilities
10 to mothball older pivotal units in order to pass the screen.
11 Or the new analysis could also have the effect of slowing
12 divestiture by rendering unattractive the purchase of
13 pivotal generation.

14 The mitigation measures in this order must be
15 implemented -- and I say implemented -- within 15 calendar
16 days, an extraordinarily short time to implement the order's
17 many directives. Moreover, compliance is required even
18 before the Commission will have the benefit of the parties'
19 comments on rehearing.

20 The Commission has already announced a broad-
21 based inquiry into our market power analysis, a rulemaking
22 that will be informed by outreach with experts and industry
23 participants. That I believe is the appropriate path to
24 take.

25 I believe that by using a complex -- and I say

1 controversial -- interim analysis and mitigation, we are
2 diverting Commission and industry resources away from the
3 important long-term solution that we all want to get to.
4 Instead, I think that the process will now be bogged down
5 with compliance and rehearing of the interim approach. I
6 just don't see the need for all of this. I think the tail
7 is wagging the dog, and all to the detriment of a sensible
8 hub and spoke method -- replacement of the hub and spoke
9 method. So I would jettison the interim analysis and get to
10 work to develop the long-term solution as quickly as
11 possible.

12 The second objective is not so clearly stated,
13 and that's the application of the SMA screen to encourage
14 large, vertically-integrated utilities to join RTOs. I
15 fully endorse the goal of fully-functioning RTOs. All of us
16 have been working quite hard to move forward with RTO
17 formation. Our Chairman is keeping our feet to the fire.
18 Certainly there is no higher priority at the Commission at
19 this time.

20 However, as a policy matter, I disagree with
21 using the threat of losing market-based rates as the stick.
22 If forming RTOs is the goal here, then we should be
23 straightforward about that and do a rulemaking to mandate
24 them going through the front door and not the back door.

25 The order ominously also holds out the

1 possibility of further mitigation should it become
2 necessary. So what does that do for certainty in minimizing
3 risk?

4 I fear that this order could have a chilling
5 effect on wholesale competition, and send the wrong message
6 to generators, one that could thwart our important goal to
7 encourage investment in the generating facilities. And I
8 don't share the order's confidence that there is a huge
9 problem, either real or perceived, that requires such
10 immediate surgery.

11 So for these reasons, I will be issuing a dissent
12 on this order. And on E-5, Huntington Beach, I think we are
13 voting on the order before us, Mr. Chairman?

14 CHAIRMAN WOOD: Yes.

15 COMMISSIONER BREATHITT: So I can support that if
16 we entertain language to change that along the lines of the
17 discussion this morning. I do want to point out that the
18 Commission, when we approved the California ISO, we did
19 approve a market monitoring and mitigation plan, and that
20 plan included a market monitoring group run within the ISO
21 and run independent of the ISO. So on 9/30/02, unless we
22 change that, there is a fallback mitigation plan in place
23 for Cal ISO.

24 CHAIRMAN WOOD: I wasn't here, but why did the
25 Commission have to intervene with its own plan if what they

1 had in place was good enough?

2 COMMISSIONER BREATHITT: If in E-47 we say that
3 the screen doesn't apply if you're in an approved ISO or RTO
4 with a Commission-approved market mitigation plan -- all I'm
5 simply saying is that, for the language in E-47 to hold true
6 to the language in Huntington Beach, we did do that.

7 CHAIRMAN WOOD: Has the Commission opined as to
8 whether the California -- other than the orders that you all
9 and we have done in April and June -- has the Commission
10 opined as to whether --

11 COMMISSIONER BREATHITT: We said that the market
12 was dysfunctional, and we've approved 40-some-odd tariff
13 changes to Cal ISO's tariff. They still have to be approved
14 as a fully-functioning RTO.

15 But I'm talking about the language in E-47. It
16 says that if you're in an approved ISO or RTO with a
17 Commission-approved market mitigation plan, then you don't
18 have to go through the screen.

19 CHAIRMAN WOOD: In E-26, right? I guess I just
20 don't view that what is out in California, once 9/30/02
21 shows up, at least today, is anything that I would put a lot
22 of confidence in, such as we do in the northeast. So I do
23 think we at least need to have a discussion about what
24 happens, not only for Huntington Beach, but for anybody else
25 that was approved under hub and spoke.

1 COMMISSIONER BREATHITT: Let me ask the team --
2 does E-26 require that the applicant in for its triennial
3 review just be in an RTO or ISO, or does it also have the
4 language that there must be -- what does it say about the
5 mitigation plan for an approved --

6 MR. ARMSTRONG: It also requires that the ISO
7 have Commission-approved market monitoring and mitigation in
8 place, so you're correct.

9 CHAIRMAN WOOD: Do we have such in place in
10 California, in the staff's opinion?

11 MR. ARMSTRONG: Through December 30, the
12 Commission-instituted market monitoring and mitigation
13 supersedes what the ISO previously had in place. And that
14 basically was a series of RMR contracts where you have
15 generation located in load pockets. That's about the extent
16 of their mitigation that would be in place after 9/30 under
17 the present rules.

18 COMMISSIONER BREATHITT: You have the market
19 monitors, too?

20 MR. ARMSTRONG: Yes.

21 COMMISSIONER MASSEY: But you had -- I mean, it's
22 essentially the same mitigation plan that was in effect in
23 June, July, August and September of 2000?

24 MR. ARMSTRONG: With the exception that they're
25 not 100 percent relying on the spot market anymore. They

1 have entered into bilateral contracts. The reliance on the
2 imbalance market has shrunk a great deal.

3 COMMISSIONER MASSEY: But in terms of mitigating
4 prices in the imbalance market, what authority does the ISO
5 have?

6 MR. ARMSTRONG: What's in place now? They would
7 just go back to what was previously there.

8 CHAIRMAN WOOD: Which is the RMR contracts.

9 MR. ARMSTRONG: In certain cases that, for bids
10 in the imbalance market, there isn't any real mitigation
11 that is going to be put in.

12 COMMISSIONER MASSEY: After 9/30/2002 there's
13 basically --

14 COMMISSIONER BREATHITT: I'm not saying it's
15 perfect. I'm just saying it's a Commission-approved plan,
16 and that's what we said that in order to not be subject to
17 this --

18 COMMISSIONER BROWNELL: Why would we not, if we
19 have concerns, ask the California ISO to come in and provide
20 us with a mitigation plan well in advance of the expiration
21 of the 9/30 date?

22 COMMISSIONER MASSEY: I think we've probably done
23 that a half a dozen times.

24 MR. ARMSTRONG: We're still waiting for that to
25 be filed.

1 MS. MARLETTE: Could I just add a couple of
2 comments?

3 The mitigation that is in effect now until
4 September, which of course is subject to rehearing, and
5 whether that is sufficient mitigation -- the Commission's
6 going to be faced next September with whether or not it is
7 still an adequate end-day, whether substitute mitigation
8 needs to be in place. We don't know what the market will be
9 like come next September.

10 So I guess in my view, for Huntington Beach's
11 purposes for this coming year, it meets the SMA test.
12 Because the Commission is assured, even though it may change
13 on rehearing, what the mitigation is. It has that option.
14 That is sufficient to mitigate market power in the ISO
15 markets.

16 Come next September, the Commission will have to
17 make a decision at that time whether market power remains
18 sufficiently mitigated. So whether the ISO comes in with a
19 new plan, the Commission imposes a new plan -- it depends on
20 the facts before the Commission at that time.

21 MR. GELINAS: And I would say, perhaps,
22 Commissioner Massey, just to directly answer: clearly, the
23 tools that the ISO has, absent our intervention at this
24 point, aren't anything resembling what some of you will be
25 discussing in the New York orders. I think it was our

1 intention when we wrote this -- by "Commission approved,"
2 we certainly intend that it be meeting our standards,
3 current standards and standards at the time that either the
4 applicant is in for a triennial update, or we're facing a
5 critical decision on whether to remove a Commission-approved
6 tool and replace it with something, whether it's ours or the
7 ISO's.

8 And I don't think the current ISO mitigation
9 would meet those standards, even though they are technically
10 approved.

11 CHAIRMAN WOOD: I'd want to make clear that, if
12 anybody's going to be able to avoid the application of the
13 SMA test by claiming they're in an ISO with Commission-
14 approved mitigation, that it be one that the four of us
15 think are appropriate tools for someone to use, and not ride
16 on the technicality that someone in the past approved it
17 before the world changed last summer. I just don't find
18 that credible at all.

19 As to how that applies to Huntington Beach, I'm
20 finally just saying, we will look at that, Huntington Beach
21 and all applicants, at the appropriate time on the record
22 here today, and let the order go out. I just want to say on
23 the record, I absolutely do not think that the California
24 ISO as it's currently structured as an organization or as
25 the tools that we've approved here -- either one of those

1 are sufficient to avoid application of the SMA test.

2 In my mind, I would much rather -- I do think,
3 actually, and this is, Linda, in response to some of the
4 comments you made -- I actually think that the specter of
5 having a California mitigation which I think all of us feel
6 is distasteful, because we had to do it, but it's not
7 anything I ever want to do again. And I think what we've
8 got to do, and it's incumbent upon us to do with some vigor
9 and expedition, is to do what is an appropriately,
10 surgically-balanced way of addressing people that have the
11 ability to take advantage of a market situation.

12 And I do think that rather than wait for a
13 rulemaking, which admittedly is on down the list, because
14 the ultimate fix is getting into wholesale market structures
15 through a more, I think, high-priority NOPR that we began in
16 RTO week -- that is going to be the higher priority item for
17 our resources in this agency in the coming months.

18 So I think, quite frankly, with a migration to
19 RTOs and ISOs, and the development of appropriate tools
20 there, the SMA test and perhaps even the follow-on
21 rulemaking will be just a transition device that we don't
22 see -- I don't know. I haven't committed to that
23 rulemaking. But I think quite frankly that as we move to
24 RTOs and that market monitoring units get developed, the
25 interim test is just a stopgap bandaid that was meant to

1 address market power until we can get a bag of tools in
2 place for going forward.

3 So I guess the bigger answer is, we won't have to
4 do a California again if we get these other tools in place
5 that deal with both non-ISO markets and ISO RTO markets;
6 that we have the whole universe covered here. And I think
7 that were I a generator or marketer, it would be much more
8 comforting than the threat or thought of a new California
9 westwide mitigation order popping up again out there, or in
10 any other part of the country going forward.

11 I do think that this is actually a surgical fix
12 toward what could be a recurring problem if we don't
13 continue to talk about infrastructure and continue to work
14 on balanced market rules in the RTO dockets. But it's going
15 to take a few years to get there, and I don't want to be
16 faced again with having to do what we had to do in June of
17 this year, or you all had to do in April.

18 So that's my thought on those items.

19 COMMISSIONER BROWNELL: Could I just add -- and
20 we're going to talk about this more later. But I think it
21 speaks to the importance of not only the standardization,
22 but insisting on accountability of the ISOs and the RTOs,
23 and making sure that they're capable and held accountable
24 for carrying out the charges that we're giving them.

25 I'm concerned that we will continue to be forced

1 to step in because of the inadequacy of their own market
2 monitoring units, or their own abilities to deliver on an
3 appropriate mitigation plan. We really need to pay
4 attention to that, because this is not how I plan to spend
5 the rest of my life at the FERC.

6 COMMISSIONER MASSEY: If I could just comment
7 that I agree long-term it's well-functioning RTOs everywhere
8 in the country that have reasonable and effective mitigation
9 tools. After-the-fact refunds six months, a year, or 18
10 months later is the poorest way to go about this. We would
11 rather effective mitigation be in place at the start, but
12 we're just not there yet, although we're trying hard to get
13 that done. And the Commission has a number of initiatives
14 underway to get these RTOs up and running.

15 My concern is the interim period. What do we do
16 until then? And not to beat a dead horse, but the whole
17 philosophy of the California order, the foundation for any
18 refunds out there, even going back to October 2, was not any
19 finding of bad behavior. We didn't find any bad behavior.
20 We said, this is a bad market.

21 And so, it seems to me that our tariff conditions
22 ought to include a bad market standard. Otherwise, if we
23 were just relying on bad behavior, which we have not found,
24 there would be not one dime of refunds in the California
25 market at all -- not a dime.

1 So I just reiterate that point, and I appreciate
2 the Chairman's willingness to try to address it. I
3 understand my other colleagues' concerns about it, and
4 hopefully we can find some reasonable accommodation.

5 MR. ARMSTRONG: Could I break in for just a
6 second?

7 If we're still talking about issuing a possible
8 notational order on E-47, the ordering paragraph B, we're
9 asking for comments to be filed within 15 days. So I just
10 want people to be aware of that.

11 CHAIRMAN WOOD: We'll vote this one out today and
12 work on another one. We'll just treat it as a parallel-
13 track item -- on 47 you said, Rich, right?

14 MR. ARMSTRONG: Yes.

15 COMMISSIONER BREATHITT: Mr. Chairman, I'd like
16 to make one more comment, and that's on E-5, which is
17 Huntington Beach. That was an order on rehearing, and I am
18 going to concur on that one, the reasoning being that
19 instead of relying on an exemption from the SMA test in
20 California, I would have granted rehearing using the method
21 under which the application at issue was originally
22 approved.

23 So I just wanted to tell my colleagues what I'm
24 doing on that one.

25 CHAIRMAN WOOD: Okay.

1 COMMISSIONER MASSEY: Mr. Chairman, were you
2 suggesting additional language to the Huntington order that
3 says we're going to take additional steps if necessary
4 before the existing temporary mitigation expires?

5 CHAIRMAN WOOD: I would like to do that. I'm not
6 sure if there's a vote for that. Nora, yea or nay?

7 COMMISSIONER BROWNELL: I'm okay.

8 CHAIRMAN WOOD: Linda, would you be interested in
9 that? If so, we'll strike it and work on it in a moment.
10 But it would be along the concept of prior to the expiration
11 of the westwide mitigation on 9/30/02 that we would review
12 the extent of mitigation efforts, of mitigation tools in the
13 west prior to its expiration.

14 Does that capture it?

15 COMMISSIONER MASSEY: Yes, or require that
16 application of the SMA screen or something like that, so
17 that it's clear that we understand that that mitigation is
18 expiring September 30, 2002. We're committed to that. But
19 we want to make sure that there is sufficient mitigation in
20 place, or that there's no market power, so that prices will
21 be just and reasonable.

22 CHAIRMAN WOOD: I would prefer to actually have
23 that in this order, if we do so.

24 I'd like to at this point strike the item, and
25 then we'll work on some language this afternoon and try to

1 get it out, if we can, today or tomorrow.

2 Linda, on some of that, on the SMA issues, you
3 would not support that, I would assume?

4 COMMISSIONER BREATHITT: I need to see the
5 language. I was just trying to make the point that what we
6 do in Huntington Beach links with language that we said, in
7 E-47, and --

8 CHAIRMAN WOOD: E-26, right?

9 COMMISSIONER BREATHITT: Right, E-26.

10 If we change the Huntington Beach order, it
11 stands to undercut the E-26 order.

12 CHAIRMAN WOOD: I think we could make the finding
13 in the E-5 order that in fact we do not view what exists
14 without our mitigation orders in the west to be remaining --
15 the RMR contracts, et cetera -- as a sufficient set of tools
16 for that market. So I would go ahead.

17 I thank you for pointing that out, because I
18 think I wouldn't want there to be any doubt in anybody's
19 mind that we think that without the Commission's mitigation
20 plan that expires in September that parties in California
21 have a system there that we have any kind of confidence in.
22 Because I don't.

23 COMMISSIONER BREATHITT: The point I'm trying to
24 make is that, if we're coming up with a new standard, we
25 need to be consistent with that standard and clearly state

1 what it is. So the standard that we're using for California
2 needs to be consistent, or consistent enough with what we're
3 doing with every other triennial application, no matter
4 where it is in the country.

5 CHAIRMAN WOOD: I would agree, and I think the
6 standard, as laid out correctly in E-26, is all sales,
7 including bilateral sales into an ISO or RTO with
8 Commission-approved market monitoring and mitigation, will
9 be exempt from the SMA, and instead will be governed by
10 specific threshold and mitigation measures approved for
11 particular markets.

12 I would take that standard in E-5 and say that,
13 what exists in California other than what we have that
14 expires on 9/30/02 is not Commission-approved market
15 monitoring and mitigation. So if any prior approvals are
16 given or are being relied upon to be used for the SMA test,
17 that doesn't meet the standard.

18 So that would leave, really, three ISOs in the
19 country that do have that standard today, which are in the
20 northeast.

21 COMMISSIONER BREATHITT: The technicality in my
22 mind, Mr. Chairman, is that we did approve -- we may not
23 like the plan, it may need to be improved upon, but it quite
24 frankly is a Commission-approved mitigation plan. It may
25 be, on a scale of 1 to 10, a 3, but technically speaking it

1 is an approved plan with inside and outside market monitors.

2 So that's why I'm saying we need to be careful,
3 and not create uncertainty, but make sure we know what the
4 standard is we're applying.

5 CHAIRMAN WOOD: Perhaps then Commission-approved
6 market monitoring and mitigation needs to be approved now in
7 the context of the application of this test going forward.
8 So maybe there would not be an approval for the New York in
9 light of what we're looking at there.

10 But I'm not willing to do that today. I think
11 that we've got time to work with California to get its tools
12 right, but I just want to say that I don't think when
13 9/30/02 comes around, and the big west-wide thing goes away
14 once and for all, that what is left underneath -- from what
15 I've been briefed on and what Mr. Armstrong reiterated today
16 -- is at all sufficient.

17 COMMISSIONER BREATHITT: I just don't want us to
18 be on a slippery slope. I want us to be on a steady slope
19 if we're going down the road of coming up with interim
20 measures. The way that we change, if at all, E-5 implicates
21 language and what we'll do in the future.

22 CHAIRMAN WOOD: We'll pass E-5 and work on that
23 this afternoon, with the concept to capture that we want to
24 avoid this issue in the first place by getting whatever the
25 appropriate balance of tools are for the ISO/RTO parties in

1 the west to continue to do after the expiration of the
2 mitigation.

3 So we've got the other two items. Ready to vote?

4 SECRETARY BOERGERS: Yes. E-26 and E-47.

5 COMMISSIONER MASSEY: Can I ask a clarification?

6 What are we voting on on E-47?

7 CHAIRMAN WOOD: The order as drafted, as
8 proposed, without any gap language in there.

9 COMMISSIONER MASSEY: Without any gap language in
10 it, but with your commitment to try to --

11 CHAIRMAN WOOD: -- put out the notational in the
12 next ten days that will put forward a gap test, and we'll
13 see if there are three votes for it.

14 COMMISSIONER MASSEY: Okay.

15 CHAIRMAN WOOD: So on 26?

16 COMMISSIONER BREATHITT: I'm voting first.

17 On E-26, I vote no. On E-47, I vote yes.

18 COMMISSIONER BROWNELL: I vote yes on both.

19 COMMISSIONER MASSEY: Aye on both.

20 CHAIRMAN WOOD: Aye on both.

21 SECRETARY BOERGERS: All right.

22 The next item, I believe, Mr. Chairman, E-12, was
23 one that you were interested in.

24 CHAIRMAN WOOD: I'm fine with it, so I would
25 recommend its approval as drafted.

1 SECRETARY BOERGERS: Could we have a vote, then?

2 Commissioner Breathitt?

3 COMMISSIONER BREATHITT: I'm sorry?

4 SECRETARY BOERGERS: A vote on E-12, the AEP

5 item.

6 COMMISSIONER BREATHITT: I vote yes.

7 COMMISSIONER BROWNELL: Yes.

8 COMMISSIONER MASSEY: Is that the interconnection

9 case? Aye.

10 CHAIRMAN WOOD: Aye.

11 SECRETARY BOERGERS: The next item is E-13, the

12 New York ISO. My understanding is that's up for discussion,

13 but no vote.

14 CHAIRMAN WOOD: We've taken up E-13 and E-35

15 together, which are both relating to the New York wholesale

16 power markets. Do we have a presentation on that or not?

17 We don't have to.

18 SECRETARY BOERGERS: E-35 was struck.

19 MS. FERNANDEZ: We didn't have a presentation.

20 CHAIRMAN WOOD: Okay.

21 My understanding is, these two are up together.

22 We're going to deal with -35 later notationally. That was

23 the in-city mitigation measures. E-13 came up.

24 I'm fine with the last draft that was put around.

25 I appreciate the hard work of everybody. I just wanted to

1 see if there are any comments from anybody.

2 COMMISSIONER BROWNELL: Yes, I have a comment.

3 That is just that I would hope that the New York ISO would
4 address these issues consistent with their neighbors. I
5 would hope they would do so expeditiously. I would hope
6 they would assess what their software needs are to deliver
7 on this and other mitigation methods, because I think it's
8 simply bad business that we're piecemealing and bandaiding
9 mitigation procedures; that they're inconsistent, and often
10 in competition with their neighboring states, when in fact I
11 think we've determined that this is essentially one market.

12 Were I the New York ISO, I would waste no time in
13 consulting with the New England ISO and PJM, although I know
14 some of this is on a separate track. I think this is simply
15 unacceptable, and certainly unacceptable to the end use
16 consumers, and it's causing continued uncertainty in the
17 markets, which is totally and completely unnecessary.

18 So I feel a little strongly about this. That's
19 my comment.

20 (Pause.)

21 CHAIRMAN WOOD: Let me ask a procedural question.
22 Can -13 be voted today, or are we going to vote them both
23 because the orders are linked?

24 MS. FERNANDEZ: We need to make some conforming
25 changes to the order. E-13 as drafted was drafted to go

1 simultaneously with E-35, and there are some cross-
2 references. So there is some cleanup that has to be done on
3 E-13.

4 CHAIRMAN WOOD: And E-35 is rejection on
5 procedural grounds.

6 Why don't we just not worry about having to clean
7 this one up? Just put them both out?

8 MS. FERNANDEZ: I think there still might be a
9 few cleanup ones. I don't think they're significant. They
10 could be done very quickly. But there are a few changes,
11 conforming-type.

12 CHAIRMAN WOOD: That sounds fine. We'll pass -13
13 and we'll take those up.

14 We are not meeting for another month, so I will
15 lift my normal prohibition against having substantive orders
16 go out notationally, just so we can get these going out.
17 Because the next meeting will be one you probably ought to
18 bring a pup tent for.

19 (Laughter.)

20 CHAIRMAN WOOD: Or something like that.

21 COMMISSIONER BROWNELL: Are you serving lunch
22 again?

23 CHAIRMAN WOOD: I'll build a little old campfire.
24 We'll put it right here in the middle.

25 So E-13 is passed. Thank you for your comments.

1 I share them, Commissioner Brownell.

2 Next, David?

3 SECRETARY BOERGERS: The next item is E-15, which
4 is Virginia Electric Power Company, Mr. Chairman. I think
5 you had some comments.

6 CHAIRMAN WOOD: I did. I hate to dissent on an
7 order, but this will have to be my first.

8 This is an interconnection agreement order, and
9 I've resigned myself to living with the policy of the
10 Commission as it's kind of evolved over Consumers, AEP, et
11 cetera. However, this one presented a new one, and I just
12 wanted to recite from one of the unresolved issues.

13 This was filed as a not-totally-agreed-to
14 contract for us to resolve the issues. I didn't agree with
15 one of the resolutions. The first issue concerns a
16 generator/owner's obligation to pay for network upgrades
17 that Dominion Virginia Power is constructing or has
18 constructed in order to accommodate this party's, CPV's,
19 interconnection request.

20 The interconnection agreement provides that, upon
21 termination of the agreement, the generator/owner remains
22 responsible for costs incurred to build the network upgrades
23 if those upgrades are necessary to complete the
24 interconnection of a lower-queued generator that has locked
25 in his costs. In other words, party number one is bearing

1 the full brunt of all the costs, when parties two, three and
2 four are benefiting from those costs being incurred, and
3 they pay nothing.

4 That is tied back to, apparently, an earlier set
5 of Commission decisions that I think, in an attempt to
6 provide certainty, do say that if you're two, three or four
7 in the queue and you've already locked in your price, it
8 won't change on you after the fact. But that's certainly a
9 valid reason.

10 I do think, however, it's very unfair and is to
11 me just kind of one more drop in the long Chinese water
12 torture of the policy that we are living under that
13 allocates these costs on a direct-payment basis when, in
14 fact, it's not only inefficient, but in the case of this
15 application unfair. So I would dissent as to the
16 Commission's discussion in IIIA and IIIB on this queuing
17 issue, and the application -- I think overly broad -- of the
18 but-for test. I think the but-for should be applicable to
19 all the other people who benefit from network upgrade, and
20 for that reason I will have to vote no.

21 COMMISSIONER MASSEY: I didn't know you had a
22 problem with this order.

23 CHAIRMAN WOOD: Okay.

24 COMMISSIONER MASSEY: Why don't we strike it and
25 try to work it out?

1 CHAIRMAN WOOD: Hope springs eternal. The item
2 is struck, with pleasure.

3 (Laughter.)

4 SECRETARY BOERGERS: Moving forward here, the
5 next item is E-22, which is the New England Power Pool item.
6 I don't believe there's a presentation on this.

7 (Pause.)

8 CHAIRMAN WOOD: I'm fine with that one.

9 MS. FERNANDEZ: E-22 is one where there was some
10 language we had been trying to work out late yesterday, and
11 I think we've gotten language I hope all the officers were
12 okay with. But that was why this was on for discussion
13 today.

14 CHAIRMAN WOOD: The revision that came in at 4:00
15 yesterday addresses everybody's concerns.

16 COMMISSIONER MASSEY: This is the order on the
17 recall ability of ICAP in New England?

18 MS. FERNANDEZ: Yes.

19 COMMISSIONER MASSEY: I'm fine with it.

20 CHAIRMAN WOOD: Let's vote. Linda?

21 COMMISSIONER BREATHITT: Aye.

22 COMMISSIONER BROWNELL: Aye.

23 COMMISSIONER MASSEY: Aye.

24 CHAIRMAN WOOD: Aye.

25 SECRETARY BOERGERS: The next item, then, is E-

1 24, Consumers Energy Company. I believe, Mr. Chairman, you
2 had something on this.

3 CHAIRMAN WOOD: This was some changes as well. I
4 actually am fine with this now. I thought it said something
5 that it didn't, and I was corrected on that. So I'm fine
6 with the order as revised yesterday.

7 SECRETARY BOERGERS: Shall we vote then?

8 COMMISSIONER BREATHITT: Aye.

9 COMMISSIONER BROWNELL: Aye.

10 COMMISSIONER MASSEY: Aye.

11 CHAIRMAN WOOD: Aye.

12 SECRETARY BOERGERS: The next item is E-43, HQ
13 Energy Services. Commissioner Breathitt, did you have an
14 issue with this?

15 COMMISSIONER BREATHITT: I don't believe I called
16 this one. I'm prepared to vote.

17 MS. FERNANDEZ: This was another item where we
18 had been working out some language late yesterday, that I
19 think the last language went around late last night.

20 CHAIRMAN WOOD: Okay.

21 COMMISSIONER BREATHITT: Aye.

22 COMMISSIONER BROWNELL: Aye.

23 COMMISSIONER MASSEY: Aye.

24 CHAIRMAN WOOD: Aye.

25 These damn Tuesday meetings. I'll just say it,

1 but everybody's thinking.

2 (Laughter.)

3 SECRETARY BOERGERS: The next item is E-46. We
4 do have a presentation on this one, by Andrew Farrell.

5 MR. FARRELL: Good morning.

6 This order grants in part and denies in part a
7 complaint filed by Reliant and Marant concerning the
8 California Department of Water Resources' role in the
9 California markets. Consistent with their November 7 order,
10 the California ISO creditworthiness order, DWR has found a
11 function as a schedule coordinator in procuring the net
12 short needs of PG&E and SoCal Edison.

13 Thus DWR must follow the ISO's tariff in the same
14 manner as other market participants. The order also finds
15 that DWR should not be privy to confidential market
16 information that is not available to other market
17 participants.

18 That concludes the presentation.

19 CHAIRMAN WOOD: You did good.

20 I just wanted him to present that because this
21 was a swiftly-dealt-with order. I want to thank staff for
22 their quick turnaround.

23 I think it's important, as we try to get
24 California back on its feet again, to hold everybody
25 accountable for doing their fair share of what needs to

1 happen here. So I'm comfortable with the cuts made in this
2 order, and am pleased to see it up and out of here so fast.

3 SECRETARY BOERGERS: Commissioner Breathitt?

4 COMMISSIONER MASSEY: I wanted to say I think
5 it's a good order. There's alleged preferential treatment
6 by the ISO toward the Department of Water Resources. We
7 find that everybody's got to follow the tariff, that nobody
8 gets preferential treatment, and I think that's where this
9 order has to come out. So it has my strong support.

10 We find, as we did two weeks ago, that DWR is a
11 scheduling coordinator and has to follow the ISO tariff
12 provisions for scheduling and bid protocols. Since the ISO
13 tariff requires the ISO to dispatch real-time energy based
14 on the merit order of BEEP Stack, allowing DWR to operate
15 outside of these provisions, DWR is not entitled to
16 privileged information.

17 Thus, information regarding the ISO-forecasted
18 net shortage conditions of the out-of-market participants
19 should be disclosed to all market participants or to no one.
20 That's what this order finds.

21 I'd like to point out that I also take seriously
22 the ISO's argument that this BEEP Stack of generation has
23 become unreliable, because power suppliers are not
24 responding to the ISO's dispatch instructions. In past
25 orders, we have told suppliers that they must follow the

1 ISO's dispatch instructions. To do otherwise threatens the
2 reliability of the grid, and if any market participant is
3 not following the tariff or not following dispatch
4 instructions, it should be reported promptly to the
5 Commission, and today's order so instructs the ISO. It has
6 my support.

7 COMMISSIONER BREATHITT: Aye.

8 COMMISSIONER BROWNELL: Aye.

9 COMMISSIONER MASSEY: Aye.

10 CHAIRMAN WOOD: Aye.

11 SECRETARY BOERGERS: The next items for
12 discussion are several items taken together: G-8, -9, -10,
13 -11 and C-4. Richard Howe has a presentation for the staff.

14 MR. HOWE: Mr. Chairman, Commissioners, these
15 five draft orders involve two general issues. The first
16 issue is, what standard should be used in determining
17 whether a customer service agreement contains a material
18 deviation from the pipeline's form of service agreement, and
19 thus must be filed with the Commission for review. The
20 second issue is then, what material deviations that are
21 filed should the Commission allow.

22 On the first issue, the draft orders clarify that
23 a material deviation from the form of service agreement is
24 any provision in a service agreement that goes beyond
25 filling in the spaces in the form of service agreement, with

1 the appropriate information provided for in the tariff, and
2 that affects the substantive rights of the parties.

3 On the second issue, the draft orders find that
4 whether a material deviation should be permitted depends on
5 the potential risk of undue discrimination among shippers
6 involved in allowing that type of provision to be
7 individually negotiated. The draft order states that one
8 category of material deviation that is generally not allowed
9 would be negotiated terms and conditions of service.

10 The Commission does allow negotiated rates. But
11 the predicate for permitting negotiated rates is that
12 service is available at the recourse rate. So the draft
13 orders find that a key factor in determining whether to
14 approve a material deviation that is negotiated as part of a
15 negotiated rate agreement is the extent to which the option
16 of obtaining service at the recourse rate is an adequate
17 alternative.

18 Now, these cases all involve provisions that
19 allow the customer to terminate or buy out of all or some of
20 its contract demands before the end of the contract. In
21 previous orders, the Commission has held that such
22 provisions may be individually negotiated as part of
23 negotiated rate deals.

24 The draft orders before you reverse that
25 precedent. The draft orders find that availability of

1 service at the recourse rate does not provide an adequate
2 substitute, since recourse service would not include buyout
3 provisions. The draft orders therefore conclude that
4 pipelines should not be permitted to negotiate such buyout
5 provisions with individual customers unless they are offered
6 subject to reasonable conditions as part of the pipeline's
7 generally applicable tariff.

8 CHAIRMAN WOOD: Thank you, Richard, for that
9 presentation.

10 When these cases first came up two meetings ago,
11 either Andrew or Larry got me a copy of Linda's concurrence
12 or dissent, a separate statement from an earlier case, and
13 Bill, you had joined her on that. And I found it actually
14 very persuasive, and at that point suggested that we might
15 want to go the other way on these cases. And I think, Nora,
16 you agreed as well.

17 I just want to say it's important, even in an
18 industry that's further down the road, as gas is, to make
19 sure that the opportunities for disparate treatment, which
20 may be welcome in a totally open market -- this is still the
21 monopoly. I mean, the provision of pipeline services in
22 most markets is still about as close to the definition of
23 monopoly as you could have, and I think we need to keep that
24 in mind as we kind of rush into the brave new world on the
25 gas side; that we want to make sure all the customers are

1 treated with nondiscriminatory practices by the regulated
2 pipeline.

3 I think this effort is a little bit of a
4 reaffirmation of that nondiscriminatory trend, perhaps to
5 the lessening of the emphasis on separately-negotiated
6 deals. I didn't get there lightly, but with reference to
7 you all's well-written separate statement of a year or so
8 ago, that I think provided a lot of persuasive reasoning for
9 why we should adopt this policy. And I support it
10 wholeheartedly.

11 COMMISSIONER BREATHITT: I have a more formal
12 comment.

13 Today we are issuing five related orders in
14 Tennessee, ANR, and Columbia which announce a new approach
15 to evaluating individually-negotiated service agreements.
16 And I highlight these orders today because, as the Chairman
17 mentioned, I have dissented several times on our application
18 of the policy prohibiting negotiated terms and conditions of
19 service.

20 When we issued Order 637, I supported the
21 prohibition against individually-negotiated terms and
22 conditions of service, because of the potential for undue
23 discrimination inherent in such arrangements. And I
24 strongly believe that it is important for new service
25 options to be made available to all similarly-situated

1 shippers under generally applicable tariff provisions.

2 The Commission ultimately decided against
3 permitting the individual negotiation of terms and
4 conditions. However, the application of this policy has
5 produced a tortured line of cases that obscure the
6 definitions of negotiated terms and conditions in non-
7 conforming service agreements, and negotiated rates. They
8 got muddled.

9 So I issued several dissents in some of the
10 underlying proceedings addressed today, expressing my
11 disagreement with that. Today, however, we are adopting a
12 policy that I believe is more pragmatic and clear with
13 respect to which agreements must be filed as nonconforming,
14 and what kinds of contractual provisions may be individually
15 negotiated. We're not saying that they can't be. We're
16 just saying that we need to be clear as to whether it's a
17 rate or a term and condition, and if it is, that it needs to
18 be offered to all similarly situated.

19 So the new analysis shifts the emphasis away from
20 parsing this confusion of rates versus terms and conditions
21 toward a more, I think, common-sense question of whether a
22 provision can be permitted without substantial risk of undue
23 discrimination. Over the past few years, the fact that the
24 Commission permits individual negotiations of rates, and not
25 terms and conditions, has played out in this tug of war,

1 which really hasn't served our objective of insuring non-
2 discriminatory rates and service.

3 So I support the application of the new policies
4 to the facts in the five orders before us. And one area
5 that has given me particular concern is our prior
6 determinations that early termination provisions are
7 permissible as negotiated rates. Now in these orders, the
8 Commission recognizes that such provisions affect the rights
9 of the shipper who is party to the agreement, and could
10 raise issues as to undue discrimination among customers, and
11 I think that's the right result.

12 So I will be supporting these orders. Thank you.

13 CHAIRMAN WOOD: Anything else?

14 COMMISSIONER MASSEY: I will be supporting the
15 orders as well, but I have a couple questions.

16 With respect to negotiated rates, which our
17 policy for several years has allowed within certain
18 parameters, how do these orders change that policy? Do
19 they?

20 MR. HOWE: The orders continue to allow
21 negotiated rates.

22 COMMISSIONER MASSEY: Do we define more precisely
23 what a negotiated rate is?

24 MR. HOWE: These orders try to bring the focus
25 more to just whether there's a chance for discrimination or

1 not. There's not been all that much trouble defining what a
2 negotiated rate per se is. The real problem has been more
3 in the negotiated terms and conditions of service.

4 What these add to the analysis when you get a
5 negotiated rate agreement is that in deciding -- negotiated
6 rate agreements sometimes have various other things in them
7 that aren't the rate, but differ from the form of service
8 agreement. And in deciding whether or not those other
9 things should be permitted, one would look to see whether
10 the recourse service option really provides an alternative.

11 So in the example here of a buyout provision, the
12 recourse service -- you can go to the pipeline and you can
13 get the recourse rate for a particular contract term or
14 contract demand. But unless the tariff actually sets forth
15 the option for having an early termination provision, the
16 recourse service wouldn't give you that.

17 COMMISSIONER MASSEY: Tell me how these orders
18 change, if any, our policy with respect to negotiated terms
19 and conditions.

20 (Pause.)

21 A stumper.

22 MR. HOWE: Well, the real focus of this is
23 looking to see what the degree of risk of undue
24 discrimination is.

25 COMMISSIONER MASSEY: Well, I understand you're

1 trying to get me back to not seeing it as a distinction
2 between rights and terms and conditions, but seeing the
3 question as: does whatever the proposal is pose a risk of
4 undue discrimination? If it does, it's got to be offered to
5 everyone. If it doesn't, it doesn't have to be offered to
6 everyone.

7 But that would be a change in policy with respect
8 to terms and conditions, would it not? Because as I
9 understood it, in the past the policy was no negotiation of
10 terms and conditions of service unless you made it a part of
11 the tariff that is available to everyone. Now we're saying,
12 if there's a risk of undue discrimination, you've got to
13 make it part of a tariff that is available to everyone. But
14 if the pipeline can come in and show that it can negotiate
15 this provision with an individual customer without raising
16 that risk, even if it is a term and condition, we might
17 allow it under this policy.

18 Is that correct?

19 MS. FERNANDEZ: I don't think the policy opens up
20 the potential for more. I think that in several of the
21 orders, we tried to explain the distinction between
22 contracts with material deviations and negotiated terms and
23 conditions as to basically what could be filed as a
24 contract, a non-conforming contract, and what had to come in
25 as a new rate schedule or change in the tariff.

1 I don't view that so much as changing the policy
2 as much as clarifying it. Because in looking at some of the
3 contracts that we were getting in, there seemed to be a lot
4 of confusion as to what could be done within that area.

5 In terms of the exit fee, the orders as drafted
6 don't specifically say whether it is a negotiated rate or
7 negotiated term and condition of service. I sort of looked
8 at it as more saying that, when we're looking at negotiated
9 rates, you can negotiate items where the recourse rate
10 really does provide an alternative. And if it doesn't,
11 whether or not we call it specifically a negotiated rate or
12 a negotiated term and condition, the major area is the exit
13 fee.

14 What's important is that it has too much
15 potential for just discrimination, so that it can't be done
16 under the negotiated rate policy.

17 COMMISSIONER MASSEY: Your clarification has
18 given me comfort, thank you, in some mysterious way.

19 (Laughter.)

20 COMMISSIONER MASSEY: Right here. But thank you,
21 I appreciate it.

22 COMMISSIONER BREATHITT: Mr. Secretary, are we
23 ready to vote?

24 SECRETARY BOERGERS: It looks like it.

25 COMMISSIONER BREATHITT: Aye.

1 COMMISSIONER BROWNELL: Aye.

2 COMMISSIONER MASSEY: Aye.

3 CHAIRMAN WOOD: Aye.

4 SECRETARY BOERGERS: That brings us to the last
5 item today, which is C-5, Dynegy petition for declaratory
6 order. And there's a presentation by Joel Arneson.

7 MR. ARNESON: In item C-5, Dynegy LNG Production
8 Terminal asked the Commission to disclaim jurisdiction over
9 the siting, construction and operation of a liquefied
10 natural gas import facility that it intends to construct in
11 light of the Energy Policy Act's amendment to Section 3 of
12 the Natural Gas Act. Among other things, the Energy Policy
13 Act declared the importation of LNG to be a first sale.

14 The order denies Dynegy's request. The order
15 finds that the Energy Policy Act deregulated the sale of
16 imported gas and LNG as a commodity, but did not remove the
17 Commission's jurisdiction over the siting, construction and
18 operation of LNG facilities.

19 CHAIRMAN WOOD: I wanted to say, I think reading
20 the legal back and forth here, it is a much closer call than
21 it could normally be here. I think, in light of the current
22 environment, though, it is the better call to make that we
23 do have jurisdiction, and process it as in the normal but
24 relatively swift format that we use to process all of the
25 applications through our Commission.

1 So nice job on the order, and for the parties,
2 good job on the briefings both ways. It was a close call,
3 and I think we do have, as the agency with expertise, the
4 right to balance the myriad issues here and make the
5 conclusion we did. So I support the order.

6 COMMISSIONER MASSEY: I agree with the legal
7 analysis. I think we do have jurisdiction legally.

8 I think it's also important to mention some of
9 the policy implications. If we were to grant the petition,
10 FERC would no longer oversee the siting, construction and
11 operation perhaps of any natural gas import facility, not
12 just LNG import facilities.

13 I see this as an unacceptable regulatory void
14 that will serve no legitimate legal or policy objective.
15 Open access would not apply, nor would there be any federal
16 oversight of the rates charged.

17 The logical extension of this petition is that a
18 large company could build an LNG import facility, and pick
19 and choose both the customers to be served and its own
20 price. An LNG facility, in my view, is a gatekeeper to the
21 U.S. market and ought to be open, and it ought to be non-
22 discriminatory, and I think Commission regulation on these
23 issues is essential to preserve open access.

24 So this order has my full and unqualified
25 support.

1 COMMISSIONER BREATHITT: The order has my full
2 and unqualified support, as well, and I would just like to
3 point out that the Commission has exercised Section 3
4 jurisdiction over LNG facilities since the Distrigas case in
5 1974. Is that correct?

6 Furthermore, the Energy Policy Act that was
7 enacted in 1992 didn't indicate in the legislative history
8 of the Act that Congress intended to remove Commission
9 jurisdiction over LNG import facilities. Furthermore,
10 because these facilities would not fall under state
11 jurisdiction, there would also be a regulatory gap without
12 our Commission's jurisdiction.

13 So I support the findings of this order.

14 CHAIRMAN WOOD: Vote?

15 COMMISSIONER BREATHITT: Aye.

16 COMMISSIONER BROWNELL: Aye.

17 COMMISSIONER MASSEY: Aye.

18 CHAIRMAN WOOD: Aye.

19 On the centenary of the birth of my grandmother
20 -- she always lied that she was born in '02, so she's
21 younger than my grandfather, but now that I'm here to
22 retort, I can say for the record she was born in 1901 --
23 meeting adjourned. Happy Thanksgiving, everybody.

24 (Whereupon, at 11:35 a.m., the meeting was
25 adjourned.)